

WEST COW CREEK PERMITTEES
v.
BUREAU OF LAND MANAGEMENT

IBLA 95-206

Decided January 22, 1998

Appeal from a decision of Administrative Law Judge Ramon M. Child affirming a decision of the Jordan Resource Area Manager, Vale District Office, Bureau of Land Management, denying applications to increase active grazing preference within the West Cow Creek Allotment. OR-030-93-01.

Affirmed.

1. Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Appeals—Grazing Permits and Licenses: Hearings—Rules of Practice: Appeals: Burden of Proof

The BLM enjoys broad discretion in determining how to adjudicate and manage grazing preference. Under 43 C.F.R. § 4.478(b), a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 C.F.R. Part 4100. The burden is on the objecting party to show by a preponderance of the evidence that the decision is unreasonable or improper.

2. Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Appeals—Grazing Permits and Licenses: Hearings—Rules of Practice: Appeals: Burden of Proof

An appellant challenging the accuracy of a range study must show not just that the results of the study could be in error, but that they are in fact erroneous. No error is established absent a showing that BLM's range survey methods are incapable of yielding accurate information, that there was a material departure from prescribed procedures, or that a demonstrably more accurate survey has disclosed a contrary result. A party challenging a decision based on a BLM expert's reasoned analysis must demonstrate by a preponderance

of the evidence that the BLM expert erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion. It is not enough to show that its expert disagrees or believes that a different course of action or interpretation is available and supported by the evidence. A BLM denial of applications to increase active grazing preference will be affirmed when monitoring studies indicate that multiple-use management objectives for the grazing allotment are not being met and that additional forage is not available on a sustained yield basis within the allotment.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for Appellants; Tony A. Sullins, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The West Cow Creek Permittees 1/ have appealed from the December 7, 1994, Decision of Administrative Law Judge (ALJ) Ramon M. Child, affirming the April 26, 1993, Decision of the Jordan Resource Area Manager, Vale District Office, Bureau of Land Management (BLM or the Bureau), denying their applications to increase their active grazing preference within the West Cow Creek Allotment.

The West Cow Creek Allotment covers 139,512 acres of Federal and 1,402 acres of private land situated about 15 miles west of Jordan Valley, Oregon. (Govt. Ex. G-15, at 1.) Approximately 29,923 acres of land within the allotment fall within the boundaries of three wilderness study areas (WSAs). (Appellant (App.) Ex. A-40, at 3.) Gently sloping to rolling lava plateaus, typifying the Great Basin, characterize the area, which is categorized as cold desert ranging in elevation from 4,000 to 5,500 feet. (Govt. Ex. G-15, at 1.)

The allotment contains 1,864 acres of fenced Federal range and 14,044 acres of land not suitable for grazing. The allotment is subdivided into 19 pastures, three of which are riparian. (Govt. Ex. G-15, at 1.) Eight permittees use the allotment annually from April 1 to October 15 and currently hold active and suspended grazing preferences of 9,591 animal unit months (AUM's) and 2,309 AUM's, respectively. 2/ Id.

1/ The permittees, who hold grazing preferences within the West Cow Creek Allotment, include Martin Andre, Pauline Baltzor, Cow Lakes Grazing Association, Inc., Fred J. Eiguren, Ralph Fillmore, Lequerica Brothers, Inc., Mahogany Creek Grazing Cooperative, Inc., and Calvin Stitzel.

2/ In 1954, BLM reduced the West Cow Creek Allotment's total preference of 13,372 AUM's by 20 percent, resulting in an active grazing preference of 10,698 AUM's and a suspended grazing preference of 2,674 AUM's. (App. Ex. A-21.) A Feb. 24, 1959, BLM Decision decreasing the active preference by an additional 50 percent was appealed, and a settlement

In January 1984, BLM issued the Southern Malheur Rangeland Program Summary (RPS), (Govt. Ex. G-13), which adopted, with minor modifications, the preferred alternative analyzed in the Draft and Final Southern Malheur Grazing Management Program Environmental Impact Statement (EIS), (Govt. Exs. G-4, G-5). ^{3/} The 1984 RPS identified the land use planning objectives for grazing management of public lands within the EIS area, including the West Cow Creek Allotment. Those objectives included "[improving] ecological condition and [increasing] forage production through the development and implementation of economically feasible grazing systems and range improvements[, and allocating] available forage between competing uses." (Govt. Ex. G-13, at 3.)

The 1984 RPS established an objective for each pasture in the West Cow Creek Allotment either to improve or to maintain ecological condition. (Govt. Ex. G-13, at 20.) It also established an initial forage allocation for the allotment of 15,271 AUM's, with adjustments to be made in increments based on monitoring. (Govt. Ex. G-13, at 14-15). ^{4/} The RPS Update issued in December 1986 increased the livestock forage allocation for the allotment to 15,567 AUM's to reflect an exchange agreement involving active grazing preferences in the West Cow Creek and Mahogany Allotments. (Govt. Ex. G-14, sec. III.A.7 and Table 1.)

The 1984 RPS described the procedure for implementing its grazing proposals:

Where the proposals reflect no change from the present situation this RPS serves as the Record of Decision.

In those cases where changes from the present situation are proposed, the changes will be implemented by agreement with the concerned parties, if possible. Where consultation does not result in agreement, individual decisions will be issued to implement the proposal.

fn. 2 (continued)

agreement resolving the appeal created the Vale Grazing Project, pursuant to which numerous range improvements and grazing system modifications have been effectuated. (App. Ex. A-23.) On Mar. 21, 1966, the Vale District Manager rescinded the 1959 Decision imposing the 50-percent reduction, but left the 20-percent reduction intact. Id.

^{3/} These documents and the December 1986 RPS Update, (Govt. Ex. G-14), comprise the land use plan for the allotment.

^{4/} The 1984 RPS specifically acknowledged that initial forage allocations would be subject to change as a result of new data gathered during the ongoing consultation, allotment agreement, and allotment management process. (Govt. Ex. G-13, at 5.) In fact, the 1984 RPS forage allocation itself was slightly less than the allocation in the EIS, due to the incorporation of 1982 forage production data. (Govt. Ex. G-13, at 9.)

In those cases where individual decisions are required they will be issued prior to the 1984 grazing decision.

Increases or decreases in livestock forage will be accomplished in three increments, on the first, third and fifth year of a five year implementation period, except that adjustments of 15 percent or less of active preference will be phased in over a period of less than 5 years. These adjustments may subsequently be modified based on the results of monitoring.

(Govt. Ex. G-13, at 10.)

On March 23, 1993, BLM received three separate grazing applications from each of the eight West Cow Creek Permittees. The first eight applications collectively requested activation of 2,309 AUM's of suspended preference in the allotment. The second set of applications sought distribution of additional forage in the amount of 3,667 AUM's consistent with the allocations in the 1984 RPS and 1986 RPS Update. The third group of applications asked for disbursement of 2,660 AUM's of additional forage based on BLM's allotment evaluation and monitoring data. (App. Ex. A-27, at 3-4.) The permittees also submitted a 5-year implementation proposal. (App. Ex. A-28.)

On April 26, 1993, the Jordan Resource Area Manager issued a Notice of Proposed Decision denying all 24 of these grazing applications on the ground that no additional forage was available on a sustained yield basis in the allotment beyond the currently authorized active preference. (Govt. Ex. G-34, at 2.) The Area Manager identified the factors influencing his decision:

1) The 1984 RPS and subsequent 1986 RPS Update used rangeland data that was gathered during a precipitation cycle that was above normal. The forage identified in the 1984 RPS for this allotment has been determined to be unavailable due to lack of permanent water sources and other range projects (cross fences) needed to properly distribute livestock use of this allotment.

2) Drought conditions during the last 6 years have resulted in reduced forage production, decreased plant vigor, reduced cover, watershed and erosion concerns, lack of livestock water, and excess livestock use around permanent water sources.

3) Allotment objectives are not being met according to data collected during the allotment evaluation process. Trend data indicates that the allotment is either in a static or slightly downward trend overall. Utilization data from the past ten years shows heavy grazing use near permanent water sources and relatively light grazing use occurring away from water. Analysis of monitoring data during the allotment evaluation process indicated that no additional forage is available within the [allotment].

4) Certified Actual Use records from the past three years show that permittees either reduced livestock numbers, reduced the grazing period or changed the grazing season to adjust to the low forage production and limited forage availability resulting from the lack of livestock water and drought.

(Govt. Ex. G-34, at 2.)

The Area Manager accordingly determined that no further forage was available on a permanent or sustained basis. Id. He also found that the current grazing system was not satisfying the land use objectives of improving or maintaining ecological condition, increasing forage production, and improving riparian areas. Accordingly, he noted that a new allotment management plan was scheduled for the allotment. (Govt. Ex. G-34, at 2-3.)

The permittees did not protest the Proposed Decision, which became final without further notice. 43 C.F.R. § 4160.3(a). In accordance with 43 C.F.R. §§ 4160.3(c), 4160.4, and 4.470(a), they appealed the final decision, requesting a hearing before an ALJ.

Judge Child held an evidentiary hearing on April 18 through 21, 1994, in Boise, Idaho. The permittees called seven witnesses. 5/ Five witnesses testified for BLM. 6/ The parties also introduced numerous exhibits and filed extensive post-hearing submissions.

In his Decision, Judge Child identified three issues raised by the appeal: (1) Whether the land use plan required an increase in the permittees' grazing preference; (2) whether BLM reasonably concluded (a) that the allocation of the applied-for forage would be inconsistent with the multiple-use management objectives for the allotment, (b) that the forage was not available on a sustained yield basis, and, thus, (c) that the applications should be denied; and (3) whether the allocation of additional forage was mandated by prior BLM decisions. (ALJ Decision at 2.) After summarizing the evidence presented at the hearing, the judge set out the standard for review of a BLM grazing decision, noting that such a decision would not be set aside if it was reasonable and substantially complied with the Federal grazing regulations. Judge Child held that the burden was on

5/ These witnesses were: William F. Schroeder, an attorney involved in the Vale Grazing Project; Robert Schweigert, a range consultant; and five permittees, including Fred Eiguren, Andrea Martin, Tim Lequerica, Glenn Caywood, and Ralph Fillmore.

6/ These witnesses were: Phillip Rumpel, a BLM range conservationist; Rod Coleman, a BLM range technician; Thomas Miles, a BLM supervisory range conservationist; Jerry Taylor, the Jordan Resource Area Manager; and Gary Guymon, a BLM range conservationist.

the objecting party to show by a preponderance of the evidence that the BLM decision was arbitrary, capricious, or inequitable because it was not supported by any rational basis. Id. at 6.

Judge Child concluded that the land use plan did not conclusively establish the stocking rate for the allotment, but instead allowed BLM the flexibility to exercise discretion regarding forage allocation based on monitoring. (ALJ Decision at 7.) In so doing, he relied on provisions in the plan specifying that adjustments to the incremental implementation of the increase in forage allocation were to be made based on monitoring. Such flexibility, he noted, conformed to BLM's obligation to manage livestock grazing under the principles of multiple use and sustained yield and in accordance with applicable land use plans. Id. The judge added that the regulations provided that additional forage could only be allocated on a nontemporary basis if the allocation was consistent with the multiple-use management objectives, and the forage was available on a sustained yield basis. Id. at 7-8. Finding both the law and the land use plan envisioned that changes in forage allocation would be accomplished through decisions supported by monitoring, and finding that monitoring indicated that objectives were not being met and additional forage was not available on a sustained yield basis, Judge Child found that BLM had a rational basis for determining that the land use plan did not mandate increasing the permittees' grazing preference nearly 10 years after plan issuance. Id. at 8.

Judge Child next evaluated the reasonableness of BLM's conclusion that, based on monitoring data, nontemporary allocation of the applied-for forage would be inconsistent with multiple-use management objectives. The judge found that the actual use/utilization trend study method advocated by the permittees (which indicated an upward trend in forage production from 1979-90 and which, according to the permittees, showed that management objectives were being met) did not adequately reflect trend toward or away from its potential or management objectives. The judge observed that, although actual use/utilization data helped monitor trend in situations where forage production provided an acceptable indication of the kind of trend being monitored, the method's failure to disclose the composition of the vegetative community in terms of percentages of various plant species limited its usefulness in monitoring trend toward or away from ecological condition objectives. Id. at 9. He added that actual use/utilization data also failed to account for the variability in production from year to year and the large amounts of annuals on the allotment. Id. at 10.

In contrast, Judge Child stated that the line intercept trend study method relied upon by BLM was more relevant to ascertaining trend in ecological condition than total production computations because it could be used to compute the composition of the vegetation by cover species and to determine whether each species was increasing, maintaining, or decreasing over time. Id. The judge noted that BLM's Technical Reference 4400-4, (Govt. Ex. G-11), identified the line intercept method as ideally suited for the vegetation types found in the allotment. (ALJ Decision at 10.) He also determined that trend plots studied by BLM were sufficiently representative of the pastures as a whole to be considered reliable. Id. at 11.

Accordingly, Judge Child concluded that BLM had reasonably relied on the line intercept method, coupled with photographic trend plot assessments and professional judgment, in determining that management objectives were not being met. Id.

Judge Child also upheld BLM's conclusion that additional forage was not available on a sustained yield basis. He held that BLM's trend data reveals that management objectives were not being met on most pastures, even though recent actual use was below the current active preference for the allotment. Further, the judge stated, other factors confirmed the unreliability of the extraordinarily high production figures computed from the actual use/utilization data. Id. According to the judge, these factors included: the great variability in production figures attributable to large fluctuations in precipitation and the consequent large changes in the amount of abundant annual forage not available on a sustained yield basis; the permittees' voluntary reduction in active grazing use below their active preference due to drought; and the lack of sufficient reliable water sources to sustain increased usage of the allotment. Id.

Judge Child noted that livestock carrying capacity could vary from year to year and that the AUM figure computed from the actual use/utilization data only provided a short-term estimate of available forage. That estimate, he concluded, did not necessarily equate to forage available on a sustained yield basis. Id. He acknowledged that the actual use/utilization forage production figure could furnish a target for proper forage apportionment if management objectives were being met. However, he found that additional forage could not be allocated to grazing on the allotment on the basis of that figure because management objectives were not being met. Id. Judge Child also approved BLM's having discounted the actual use/utilization figure on the ground that the additional forage represented an increase in annuals not available on a sustained yield basis. Id.

Judge Child concluded that prior Departmental decisions did not mandate allocation of additional forage to the permittees. The statement in the March 21, 1996, BLM Decision providing that future adjustments in grazing use would "be based upon a future determination of grazing capacity if and when such adjustments prove to be necessary," (App. Ex. A-23), did not compel an increase in active grazing preference. The judge found that, because it was unclear what the Decision required, and, to the extent that the Decision conflicted with current law, the law controlled. (ALJ Decision at 12-13.) He interpreted the 1984 RPS provision stating that livestock use adjustments would "be made only when and to the extent, estimated forage production is greater or less than 10 percent of current active preference," (Govt. Ex. G-13, at 1), as an additional limitation on BLM's ability to adjust livestock use within the allotment rather than a directive that active grazing preference must be increased whenever livestock carrying capacity exceeded active preference by 10 percent. (ALJ Decision at 12-13.) Finally, Judge Child rejected the permittees' claim that a factual finding made by the ALJ in Glenn Grenke v. BLM (Grenke), OR-030- 87-01 (Apr. 11, 1989), that 5,700 AUM's of excess forage were available in the allotment conclusively established the existence of such additional

forage, noting that this determination was set aside on appeal in Glenn Grenke v. BLM, 122 IBLA 123 (1992), and was not binding on any party. (ALJ Decision at 13, 15.)

Judge Child, therefore, held that BLM's Decision denying the applications was reasonable and substantially complied with the grazing regulations, and he affirmed the Decision. Id. at 14, 15.

In their Statement of Reasons, the permittees challenge numerous procedural and substantive aspects of Judge Child's Decision. While accepting the judge's identification of the appropriate standard of review, they object to his expansion of the scope of BLM's discretion, his placement of the burden of nonpersuasion, and his determination that BLM's evidence preponderated. Specifically, they assert that BLM's discretion is circumscribed by the regulations, which do not allow the substitution of professional judgment for rangeland studies when determining grazing capacity or evaluating management objectives. They also claim that the judge erroneously placed the burden of nonpersuasion on them instead of on BLM, whom they deem to be the proponent of the rule or order, insisting that the case rests on BLM's allegations that the land use plan does not specify a change in grazing use and that monitoring data do not support such a change.

The permittees dispute the judge's conclusion that the land use plan did not dictate an increase in their grazing preferences. They aver that the plan did not condition the distribution of the allocated forage on monitoring data but, instead, directed immediate apportionment through agreement or decision and that BLM did neither. They argue that the passage of time is irrelevant and assert that the legal test is whether the allocation is consistent with management objectives, not whether those objectives have been met. They further maintain that BLM's authority to periodically review grazing preferences and make changes supported by rangeland studies does not supersede changes delineated in an applicable land use plan. The permittees contend that, since the plan is controlling, their applications should have been granted, at least to the extent of the number of AUM's specified in the land use plan.

The permittees assert that the land use plan mandates an upward adjustment in active grazing preference when livestock carrying capacity exceeds active grazing use by 10 percent. They add that BLM's March 21, 1966, Decision, which they consider still in effect, requires adjustments in grazing use to be based on determinations of grazing capacity. Both these directives, the permittees submit, support their contention that BLM must increase their grazing preferences.

The permittees insist that there is additional forage available on a sustained yield basis within the allotment. While agreeing with Judge Child that actual use/utilization data does not by itself determine livestock carrying capacity on a sustained yield basis, they maintain that such data collected over time can establish livestock carrying capacity and the availability of additional forage. They object to the judge's limitation of the utility of actual use/utilization data to short-term grazing decisions, noting that BLM's own technical manuals recognize that this information may be useful in determining production trends over the long term.

The permittees point out that, using the BLM-approved formula, livestock carrying capacity calculated from actual use/ utilization figures adequately accounts for variations in precipitation, since the formula includes a crop yield index which adjusts the result to a normal precipitation year. They assert that the allotment's carrying capacity over the 17-year time period did not fluctuate wildly and that most of the variations stemmed from their voluntarily resting pastures, not forage production. In any event, they contend that the results show a steady increase in capacity over time.

The permittees acknowledge that various factors cited by BLM can hamper optimal exploitation of the livestock carrying capacity, but contend that none of those factors apply here. They deny that drought conditions have negatively impacted the allotment. Water availability is also not a limiting factor, they submit, because each pasture has either sufficient water sources or has had adequate water hauled to it during grazing season. They maintain that neither the deferred-rotation grazing system employed in the allotment nor its topography restrict access to the available forage. The permittees aver that the presence of annual grasses does not adversely affect the carrying capacity of the allotment. They contend that BLM rangeland studies refute BLM's "speculations" that annual forage production varies widely, that the amount of annuals alters the utilization of the monitored key perennials and skews the livestock carrying capacity, and that consumption of annuals undermines the reliability of actual use data.

The permittees argue that trend and condition do not establish the carrying capacity of the allotment. They assert that Judge Child confused "carrying capacity" with "capacity available on a sustained yield basis in consideration of management objectives," i.e., trend, an issue irrelevant to determining carrying capacity. They aver that, since no limiting factors exist and trend data has no bearing on this question, the allotment's carrying capacity is 20,184 AUM's, and that 10,593 AUM's of additional forage exist within the allotment.

The permittees admit that authorizing the use of additional forage must be consistent with multiple-use management objectives, but differentiate between being consistent with objectives and meeting those objectives. They contend that the land use plan recognizes that allocating the specified forage at the established utilization levels would be consistent with multiple-use objectives and the long-term objectives for the rangeland. The permittees submit that the average adjusted utilization for each pasture for the period 1979-90 was well below the objective prescribed in the land use plan, and that the actual use/utilization monitoring data collected during that time period indicated that the allotment's carrying capacity was between 20,318 and 21,537 AUM's. Thus, they contend that distributing the additional forage available on a sustained yield basis would be consistent with the multiple-use management objectives set forth in the land use plan.

The permittees maintain that Judge Child erred by accepting the general and unsupported opinions of BLM's witnesses that management objectives have not been met within the allotment. They note that the land

use plan objective at issue focuses on improving ecological condition and increasing forage production, the analysis of which centers on trend information. The permittees assert that ecological condition is rooted in production, and that, absent a complete reinventory, the best evidence of trend in ecological condition and forage production is forage production data. They claim that actual use, utilization, and climate data provide one of the more sensitive and useful methods of monitoring trend in ecological condition and forage production. According to permittees, the actual use, utilization, and climate information collected by BLM reveals an improving and increasing forage production and establishes that the land use plan objective of improving ecological condition and forage production is being met.

The permittees disparage the efficacy of the line intercept trend study technique as a means of evaluating ecological condition and forage production. This method, they maintain, measures basal or canopy cover and thus cannot reliably underpin an opinion of trend in ecological condition or forage production. The permittees contend that, in any event, BLM admits that the line intercept trend data shows that the ecological condition and forage production objective has been achieved on 50 percent of the pastures. The permittees posit that failure to accomplish a management objective on a portion of the allotment does not mean the objective is not being met on the allotment as a whole. They argue that this is especially true because they have assertedly proven that the additional forage available in pastures where the objectives are being met supports the additional AUM's sought, without increasing active use in those pastures not meeting management objectives. The permittees insist that, because the multiple-use management objectives have been satisfied, the additional forage available on a sustained yield basis must be distributed and their applications granted.

The permittees further argue that the Hearing Division's factual finding in Grenke that 5,700 AUM's of excess forage was available on the allotment survived when the Board set aside and remanded that decision. They contend that the Board based its ruling on the adverse parties' lack of adequate notice of the application and opportunity to respond, and the Board did not explicitly set aside the finding that excess forage existed. The permittees urge that reconsideration of this issue is precluded by the doctrine of administrative finality. ^{7/} They, therefore, request that Judge Child's Decision be reversed and all their applications granted.

^{7/} The permittees admit that Judge Child's Decision did not find that denial of their applications was proper because part of the allotment falls within WSA's. However, they characterize his recitation of BLM testimony that wilderness values would be negatively impacted if active preference were increased as inferring this finding and argue that such an inference is erroneous. We do not construe the judge's recounting of this testimony as an inferential finding and, accordingly, will not address the WSA-related issues raised by the permittees or BLM. Those issues have no relevance to the Decision before us.

In its Answer, BLM dismisses the permittees' attempt to shift the burden of proof, pointing out that since the permittees applied for additional AUM's, BLM clearly is not the proponent of the rule or order. It submits that the burden of proving by a preponderance of the evidence that the denial of the applications was improper and had no rational basis thus rests with the permittees and that they have not met that burden.

The Bureau denies that the land use plan requires increasing permittees' grazing preference, arguing that increases in grazing preferences to the AUM level indicated in the 1984 RPS and the 1986 RPS Update should not occur until monitoring establishes that enough forage exists to support the increased use. The Bureau bolsters its position by citing Board precedent holding that an RPS does not require maintenance of the initial preference levels allotted, but instead allows informed decisionmaking based on appropriate monitoring studies to determine proper grazing preference levels. The Bureau maintains that the preamble accompanying the proposed regulations amending 43 C.F.R. Part 4100, published on May 20, 1987, advances the nonbinding nature of land use plan livestock allocations, (52 Fed. Reg. 19032, 19033 (May 20, 1987)), as does 43 C.F.R. § 4100.0-8, which provides that land use plans establish allowable resource uses, not mandatory uses. Furthermore, BLM asserts that the Federal case law recognizing the need for flexibility in grazing capacity decisions strengthens the reasonableness of BLM's position that the land use plan allocation figures do not mandate a stocking level. The Bureau, therefore, submits that its determination that additional forage may not be distributed unless multiple-use management objectives are being met finds ample legal support.

The Bureau argues that allocation of the applied-for forage would be inconsistent with multiple-use management objectives, that the forage is not available on a sustained yield basis, and, thus, the applications should be denied. The Bureau stresses the significance of monitoring trend in evaluating whether the management objective of improving or maintaining ecological condition has been met on each of the pastures in the allotment. According to BLM, the line intercept trend study, coupled with photographic trend assessments and professional judgment, allows measurement of changes in cover of vegetation and species composition either toward or away from the potential natural community and provides a better means of ascertaining the trend of ecological condition than actual use/utilization data. The permittees' challenge of the reliability of the line intercept monitoring method, BLM avers, simply amounts to professional disagreement between experts, which is insufficient to overturn BLM's findings. The Bureau contends that the line intercept data, as summarized in the 1990 West Cow Creek Allotment Evaluation, (Govt. Ex. G-15), reveals that the ecological condition objectives are not being met on 12 of the 16 pastures in the allotment.

The Bureau asserts that other factors, including water distribution and voluntary reductions in grazing use, also justify the denial of the permittees' applications. Acknowledging that applying the actual use/utilization formula set forth in the Vale District Monitoring Plan, (Govt.

Ex. G-6, at 7-8), to its own data generates a carrying capacity figure of between 18,100 and 20,262 AUM's for the allotment, BLM suggests that the key question centers on the value of these extraordinarily high numbers, given the other monitoring data which indicate that management objectives are not being met under current levels of grazing. The Bureau avers that forage on an allotment is not available for allocation on a sustained yield basis if management objectives are not being met. The accuracy of the values produced by applying the formula are also suspect, BLM argues, because of wide variations in precipitation and annual forage production. The Bureau submits that the permittees failed to meet their burden of showing that BLM acted irrationally or arbitrarily when denying their requests for increased active grazing preference AUM's.

The Bureau denies that its prior decisions mandate the allocation of additional forage. The March 21, 1966, Decision's reference to grazing capacity cannot be interpreted as requiring an upward adjustment in livestock grazing use without proper deference to management objectives, BLM insists; nor can the RPS provision limiting such adjustments to times when forage production exceeds current grazing preference by 10 percent be construed as mandating such an increase. The Bureau maintains that apportionment of additional forage remains a discretionary act, permissible only if the allocation is consistent with multiple-use management objectives, and if the forage is available on a sustained yield basis.

The Bureau further disputes the permittees' contention that the factual finding in Grenke conclusively establishes that 5,700 AUM's of excess forage are available in the allotment, asserting that a decision that has been set aside by an appellate tribunal may not be cited as precedent and that decision's factual findings and legal conclusions do not bind anyone. The Bureau, therefore, concludes that Judge Child's Decision must be affirmed.

[1] Section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (1994), authorizes the Secretary, with respect to grazing districts on public lands, to "make such rules and regulations" and to "do any and all things necessary to * * * insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." Title IV of the Federal Land Policy and Management Act of 1976, amending the Taylor Grazing Act, reiterates the Federal commitment to protecting and improving Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1994); see also Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1994).

Implementation of the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315, 315a-315r (1994), is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. Kelly v. BLM, 131 IBLA 146, 151 (1994); Yardley v. BLM, 123 IBLA 80, 89 (1992), and cases cited therein. The Bureau enjoys broad discretion in determining how to manage and adjudicate grazing preferences. Riddle Ranches, Inc. v. BLM, 138 IBLA 82, 84 (1997); Yardley v. BLM, 123 IBLA at 90. Under

43 C.F.R. § 4.478(b), BLM's adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an ALJ and by this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis. Riddle Ranches, Inc. v. BLM, 138 IBLA at 84. Although unusual, this scope of review recognizes the highly discretionary nature of the Secretary's responsibility for Federal range lands. Id.; Kelly v. BLM, supra; Claridge v. BLM, 71 IBLA 46, 50 (1983).

The standard of proof to be applied in weighing evidence presented at a hearing held pursuant to an appeal of a grazing decision issued by BLM is the preponderance of the evidence test. Riddle Ranches, Inc. v. BLM, supra; Kelly v. BLM, supra; Eason v. BLM, 127 IBLA 259, 262-63 (1993). If a decision determining grazing privileges has been reached in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper. Kelly v. BLM, supra. The permittees have not persuaded us that BLM is the proponent of the rule or order in this case, and we reject their attempt to shift the burden of proof to BLM.

Before analyzing the reasonableness of BLM's justification for denying the applications, we first dispose of the permittees' claims that previous Departmental determinations mandate distribution of additional active grazing preferences. Although the 1984 RPS and the 1986 RPS Update allocated 15,271 AUM's and 15,567 AUM's, respectively, to livestock grazing, we find that these initial forage apportionments are not immutable. The RPS itself states that "[t]he initial livestock forage allocations will be subject to some change as a result of new data gathered during the ongoing consultation, allotment agreement and allotment management plan (AMP) process." (Govt. Ex. G-13, at 5.) The grazing decision component of the RPS specifies that the increases or decreases in forage allocations proposed for each allotment set forth in appendix 1 will be accomplished incrementally, and that these adjustments "may subsequently be modified based on the results of monitoring." (Govt. Ex. G-13, at 10.) One of the comments appended to the livestock forage allocation for the allotment found in appendix 1 also notes that adjustments to livestock use will be made in increments based on monitoring studies. (Govt. Ex. G-13, at 14-15 and comment 11.) Thus, the RPS, by its own terms, does not rigidly mandate distribution of the enumerated AUM's, regardless of current monitoring data.

The land use plan's recognition that forage allocations were subject to modification based on monitoring studies coincides with the provision in 43 C.F.R. § 4100.0-8 stating that such plans "establish allowable resource uses," (emphasis added). See also 52 Fed. Reg. 19032, 19033 (May 20, 1987) (indicating that a land use plan "does not cast future action in concrete; rather it provides guidance"). In Miller v. BLM, 118 IBLA 354 (1991), the

Board rejected the argument that 43 C.F.R. § 4110.3, which provides that changes in grazing preference must be supported by monitoring "unless the change is * * * specified in an applicable land use plan," prohibited changes in the grazing preferences set out in a land use plan. The Board held that, to the contrary, "the RPS did not require maintenance of the initial preference levels allotted, but instead allowed informed decisionmaking, using monitoring studies, as appropriate, to determine proper levels of grazing preference * * *." 118 IBLA at 363. See also Dorius v. BLM, 83 IBLA 29, 39-40 (1984) (noting BLM policy requiring later trend studies to support changes in grazing permits where there is a lapse between the forage study and the decision to increase or decrease grazing use). Thus, BLM was not obligated to distribute the forage allocated to livestock in the RPS or the RPS Update.

We also conclude that the factual finding in Grenke does not definitively establish that 5,700 AUM's of excess forage are available in the allotment. Decisions of administrative law judges are not Departmental precedents and are not binding on this Board or other administrative law judges. McLean v. BLM, 133 IBLA 225, 235 n.16 (1995). In any event, in Grenke v. BLM, 122 IBLA 123 (1992), the Board set aside the ALJ's Decision, effectively voiding any factual findings contained in Grenke. See Miller v. BLM, 118 IBLA at 361-62 n.2 (noting that reversal of a decision also reverses dicta contained in that decision). The factual findings in Grenke have no relevance to this proceeding.

We further conclude that neither the March 21, 1966, Decision's statement that future adjustments in grazing use within the allotment would be based "upon a future determination of grazing capacity if and when such adjustments prove to be necessary," (App. Ex. A-23), nor the RPS provision indicating that livestock use adjustments would be made "only when and to the extent, estimated forage production is greater or less than 10 percent of current active preference," (Govt. Ex. G-13, at 1), mandate allocation of any additional active grazing use preferences. The grazing regulations direct the authorized BLM officer to manage livestock grazing on public lands under the principle of multiple use and sustained yield. 43 C.F.R. § 4100.0-8. Under the regulations, additional forage may be apportioned to qualified applicants for livestock grazing use consistent with multiple-use management objectives, but such additional forage must be available on a sustained yield basis if an applicant seeks more than a nonrenewable grazing use increase. See 43 C.F.R. § 4110.3-1. Any adjustments arguably authorized by either the March 21, 1966, Decision, or the identified RPS provision would still have to comply with these regulatory strictures. Accordingly, we conclude that no Departmental determination unconditionally requires distribution of additional active grazing use preferences to the permittees.

The permittees insist, in any event, that additional forage is available on a sustained yield basis within the allotment and that allocation of that forage to the permittees holding preferences would be consistent

with multiple-use management objectives. Judge Child's and BLM's determinations to the contrary are flawed, the permittees maintain, because BLM used improper trend study methods and then misapplied those methods.

[2] An appellant challenging the accuracy of a range study must show not just that the results of that study could be in error, but that they are erroneous. See Glanville Farms, Inc. v. BLM, 122 IBLA 77, 87 (1992); Dorius v. BLM, 83 IBLA at 37. Error in BLM's findings can be established only by showing that BLM's range study methods are incapable of yielding accurate information, that BLM materially departed from prescribed procedures, or that a demonstrably more accurate study has disclosed a contrary result. See Glanville Farms, Inc. v. BLM, 122 IBLA at 87-88; Dorius v. BLM, *supra*.

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Kings Meadow Ranches, 126 IBLA 339, 342 (1993); Animal Protection Institute of America, 118 IBLA 63, 76 (1991). A party challenging BLM's evaluation must do more than offer a contrary opinion; an appellant must show by a preponderance of the evidence that BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion, and not simply that a different course of action or interpretation is available and supported by the evidence. Animal Protection Institute of America, *supra*, and cases cited. Mere professional disagreement voiced by an appellant's expert does not suffice to establish error in studies conducted by a BLM range conservationist. See Riddle Ranches v. BLM, 138 IBLA at 85-86.

The land use planning objectives for grazing management of public lands within the Southern Malheur area set out in the RPS include the goal of improving or maintaining ecological condition and increasing forage production. (Govt. Ex. G-13, at 3.) The RPS further specifies the primary objective of either improving or maintaining ecological condition for each of the 19 pastures within the allotment. See Govt. Ex. G-13, at 20. Ecological condition, more accurately called ecological status, (see Govt. Ex. G-8, at 6), describes

the present state of vegetation of a range site in relation to the potential natural community for the site. Ecological status is use independent. It is an expression of the relative degree to which the kinds, proportions, and amounts of plants in a plant community resemble that of the potential natural community.

(Govt. Ex. G-10, at 39.)

According to Rangeland Monitoring Technical Reference 4400-4,

[t]rend data are important in determining the effectiveness of on-the-ground management actions and evaluating progress toward meeting management objectives on rangeland administered by [BLM]. Trend refers to the direction of change. It indicates whether the rangeland is moving toward or away from its potential or

toward or away from specific management objectives. Trend of a rangeland may be judged by noting changes in characteristics such as composition, density, cover, production, and frequency of the vegetation, and related parameters of other resources.

(Govt. Ex. G-11, at 1.) No single trend study method is suitable for all vegetation types and management situations, and selection of a sound sampling technique which is sensitive to changes in the plant community, unbiased, efficient, and cost effective is critical to the success of the monitoring study. Id. at 4. Professional judgment also is an integral part of any monitoring program. (Govt. Ex. G-8, at 5.)

The 1983 Vale District Monitoring Plan designates the line intercept method as the primary trend study method to be used in the Vale District, supplemented, where necessary, by trend plot photographic assessments. The Plan requires trend study sites to be located in at least one key area in each pasture of an allotment. (Govt. Ex. G-6, at 10.) The line intercept method consists of horizontal, linear measurements of plant intercepts along the course of a line and is ideally suited for semiarid, bunchgrass shrub vegetation types. (Gov. Ex. G-11, at 42.) This method requires that at least two permanent 50-foot line transects be established and permanently marked at each study site and that plant intercepts along the

tape must be recorded, with measurements read to the nearest 1/100 foot.

See Govt. Exs. G-6, at 11, G-8, at 37. The method also entails plotting, diagramming, and photographing the study area. See Govt. Exs. G-6, at 11, G-11, at 44. The line intercept method gauges the basal area of perennial bunchgrasses and rosette form perennial and biennial forbs and the canopy cover of shrubs, trees, and biennial and perennial forbs, and is considered an exact relocation study, with the increase or decrease in the size and number of individual species under a specific line being the basis of a determination of trend for that key area. (Govt. Ex. G-8, at 37.) Both cover by species and percent species composition can be computed from data collected using this method. (Govt. Exs. G-6, at 10-11, G-11, at 45.)

At the hearing, BLM presented graphs showing the percent cover of key species, the number of intercepts on the line, the actual use data, and the crop year precipitation index for all the pastures containing long-term trend plots. See Tr. at 353, 355-56; Govt. Ex. G-31. Miles, a supervisory range conservationist for the Jordan Resource Area, BLM, with experience in interpreting trend data, explained each graph and proffered his professional judgment as to the trend of each pasture based on the trend information depicted by the graphs. (Tr. at 355-94.) He also testified that if management objectives were being met on some pastures but not on others, then management objectives for the allotment as a whole were not being met. (Tr. at 400-401.)

In accordance with the Monitoring Plan, BLM relied on the line intercept method as its primary tool when evaluating whether the objective of improving or maintaining ecological condition was being achieved on each pasture within the allotment. The 1990 Allotment Evaluation for the West Cow Creek Allotment summarizes the results of the trend studies. It indicates that management objectives were not being met on six pastures where

the management objective was to improve ecological condition, because the trend was "static," showing no improvement. It indicates that management objectives were also not being met on six other pastures where the management objective was to maintain ecological condition, and the trend was "down." ^{8/} (Govt. Ex. G-15, at 12.)

The permittees counter BLM's evaluation with the testimony of Schweigert, a range consultant formerly employed by BLM. Schweigert opined that forage production calculated from BLM's actual use/utilization figures, not the line intercept trend study method, provided the optimal means of assessing whether ecological condition management objectives were being met on the allotment and that this data showed an improving trend, thus fulfilling management objectives. (Tr. at 274-75; App. Ex. A-26.) He testified that, as recognized by BLM, the actual use/utilization formula, in addition to yielding an estimate of the proper stocking rate in the short term, also assisted in determining trend and production over the long term. (Tr. at 637.) He considered ecological condition to be based on production and discounted the probity of the line intercept method in evaluating ecological condition because it did not measure basal area in square footage, produce a figure reflecting production, or sample the entire plant population in the key area, but simply measured changes under the line. (Tr. at 638-39.) He suggested that BLM's method was essentially dimensionless since the line was 100 feet long but zero feet wide and thus sampled an area of zero acres as compared to the actual use/utilization method which involved observations of larger areas and was more representative of the pasture as a whole. (Tr. at 640.)

Schweigert also questioned the reliability of data from some of the trend plots studied by BLM because the sites were located either in burned areas or close to disturbing factors, such as roads and fence posts, but found few or no flaws with other sites. (Tr. at 643-54.) Testimony and photographs presented by BLM, on the other hand, indicated that the trend plots fairly represented the allotment as a whole and illustrated changes in the perennial forage in the pastures. See Tr. at 311, 415-443; Govt. Ex. G-32.

The permittees have failed to show error in BLM's choice of the line intercept trend study method or in BLM's selection of trend study sites. Ecological condition entails more than just production, (Govt. Ex. G-10,

^{8/} The Bureau offered into evidence an errata sheet for the Allotment Evaluation, (Govt. Ex. G-16), which Judge Child did not admit. (Tr. at 65-66.) The corrections made in the errata sheet removed three pastures from the list of those not meeting management objectives. For one pasture with the objective of improving ecological condition, BLM elevated the trend from "static" to "up." For two pastures with the objective of maintaining ecological condition, it upgraded the trend from "down" to "static." (Govt. Ex. G-16, at 1-2.)

at 39), and monitoring the trend of rangeland conditions involves observing changes in characteristics such as composition, density, cover, and frequency of the vegetation, as well as production, (Govt. Ex. G-11, at 1). Data collected by the line intercept method can be used to judge shifts in many of these characteristics, including cover by species and percent species composition. See Govt. Exs. G-6, at 10-11; G-11, at 45. The actual use/utilization formula adequately monitors trend only when production provides an appropriate manifestation of the type of trend being monitored. (Govt. Ex. G-8, at 9.) We find that the permittees have not demonstrated that BLM erred in using the line intercept trend study method rather than the actual use/utilization formula. Nor have they shown by the preponderance of the evidence that the trend study sites utilized by BLM are not sufficiently representative to be considered reliable. Accordingly, we agree with Judge Child that BLM properly relied upon the line intercept trend study method, as supplemented by photographic trend plot assessments and professional judgment, in determining that management objectives were not being met on the allotment as a whole.

Additional forage on an allotment may not be apportioned to qualified applicants unless such distribution is consistent with management objectives. 43 C.F.R. § 4110.3-1. We find that the permittees have failed to show error in BLM's conclusion that additional forage is not available on a sustained yield basis within the allotment.

The witnesses presented by BLM discounted the extraordinarily high production figures generated by applying the actual use/utilization formula to BLM data because other factors cast doubt on the reliability of the production figures used by the permittees. These factors included the trend monitoring data indicating that management objectives were not being met under current levels of grazing, the great variability in production figures attributable at least in part to fluctuations in precipitation and abundant annuals not available on a sustained yield basis, the permittees' voluntary reduction of their active grazing use, the poor condition of the rangeland resulting from the extended drought and the burning of a large portion of the allotment over the last 15 years, the drought and burn induced deviations from the established grazing system, and the lack of sufficiently reliable water sources to sustain higher usage of the allotment. See Tr. at 42-52, 320-23, 327, 331-35, 339, 409, 415-443, 538-39, 685-86. The confluence of all these components led BLM to conclude that no additional AUM's were available on a sustained yield basis within the allotment. (Tr. at 52, 450.)

The permittees rely on the livestock carrying capacity derived from the actual use/utilization formula as demonstrating that sufficient additional forage is available on the allotment to satisfy all their applications and deny that any of the factors identified by BLM limit the availability of that forage. The AUM figure furnished by the actual use/utilization formula provides an estimate of proper stocking rates in the short term, (Govt. Ex. G-6, at 8), but the formula's livestock carrying capacity is not inevitably interchangeable with forage available on a

sustained yield basis since livestock carrying capacity, by definition, "may vary from year to year on the same area due to fluctuating forage production." 43 C.F.R. § 4100.0-5.

Factors such as the trend and the amount of annual forage, as well as the actual use/utilization formula, influence the determination of grazing capacity. Glanville Farms v. BLM, 122 IBLA at 88. There is no dispute that the allotment contains significant annual forage. The Bureau limits consideration of annual forage to the minimum amount expected when calculating grazing capacity, since the amount of annual forage may vary widely from year to year, depending on available moisture. Stocking the range on the basis of total forage, both annual and perennial, could severely overrate the range. Briggs v. BLM, 75 IBLA 301, 304 (1983); see also Glanville Farms v. BLM, supra. The permittees' disagreement with BLM's evaluation of the importance of other factors affecting the amount of forage available on a sustained yield basis has not convinced us that BLM's analysis was unreasonable. Thus, the permittees have not demonstrated that BLM erred in refusing to accept the actual use/utilization formula production figure as embodying the forage available on a sustained yield basis within the allotment.

To the extent not specifically addressed herein, the permittees' other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur.

R.W. Mullen
Administrative Judge

